

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

ABIGAIL F. RANSOM, BONNIE *
KURZ, LORI A. HOPMANN, VERNON *
K. HENNEMAN, JR., and DANIEL *
W. OWINGS, Individually and *
On Behalf of All Others *
Similarly Situated, *
Plaintiffs, * Civil Action No.
v. * A:10-CA-857-AWA
*
M. PATEL ENTERPRISES, INC., * Jury Demanded
M. PATEL ENTERPRISES, INC. *
d/b/a PARTY CITY, M. PATEL *
ENTERPRISES, INC. d/b/a PARTY *
PIG SUPERSTORE, MITESH M. *
PATEL, and JAYMINI AMIN, * November 7, 2011
a/k/a JAYMI PATEL, *
Defendants. * Austin, Texas

EXCERPT OF TRANSCRIPT OF TRIAL
THE OPENING STATEMENTS FOR BOTH
PLAINTIFFS AND DEFENDANTS
BEFORE THE HONORABLE ANDREW AUSTIN
UNITED STATES MAGISTRATE JUDGE
AND A JURY

APPEARANCES:

For the Plaintiffs: Mr. Edmond S. Moreland, Jr.
FLOREANI MORELAND, LLP
13500 Ranch Road 12, Suite E
Wimberley, Texas 78676
Mr. David Weiser
Mr. Adam Casner
KATOR, PARKS & WEISER, PLLC
1609 Shoal Creek Blvd.
Suite 201
Austin, Texas 78701

For the Defendants: Mr. Justin M. Welch
BLAZIER, CHRISTENSEN, BIGELOW,
& VIRR, PC
221 West 6th Street
Suite 2000
Austin, Texas 78701

1 APPEARANCES(cont.):

2 Court Reporter: Paige S. Watts, CSR/RPR
3 DEPUTY OFFICIAL COURT REPORTER
4 1016 La Posada Drive
5 Suite 294
Austin, Texas 78752

6 (Proceedings recorded by mechanical stenography,
7 transcript produced by computer)
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1 (Opening Statements)

2 THE COURT: Then I'll go ahead and
3 recognize the Plaintiff for opening statement.

4 MR. MORELAND: Thank you, Your Honor.

5 As I said during voir dire --

6 THE COURT: I'm sorry. I'm going to
7 interrupt you one more time.

8 MR. MORELAND: That's okay.

9 THE COURT: I'm going to limit the
10 attorneys to 20 minutes. So if you see me cut them off,
11 that's why.

12 MR. MORELAND: Thank you, Your Honor.

13 As I indicated during voir dire, this is
14 a case about fair pay for long hours. The Plaintiffs in
15 this case were Executive Managers for the Defendants,
16 and they worked extremely long hours working for the
17 Defendants. Oftentimes, over 55 hours in a week; but
18 sometimes up to 60, 70, 80, 90, sometimes over 100 hours
19 a week and they did so without any overtime payment and
20 for a set wage, a set amount per week in a wage, as a
21 wage.

22 And sometimes the Plaintiffs worked so
23 many hours during a week, that they actually fell below
24 the minimum wage on an hourly basis. Sometimes they
25 worked for as little about \$4.61 cents an hour. Now, I

1 have -- let me show you the gravity of what we're
2 talking about here. This is Plaintiffs' Exhibit 1 that
3 has been preadmitted by the Court, and this is a chart
4 showing the number of -- total number of hours that the
5 Plaintiffs worked as Executive Manager and then the
6 total number of overtime hours that the Plaintiffs
7 worked as Executive Managers. And as you can see,
8 nearly one-third of their total hours spent working for
9 the Defendants as Executive Managers are overtime hours.

10 Now, at the close of this case, we will
11 be asking you to return a verdict for the Plaintiffs
12 that entitles them to overtime pay and entitles them to
13 the minimum wage. And we will ask you to return a
14 verdict for the Plaintiffs that returns to them the
15 money they've already worked long hours for the
16 Defendants and have already earned. That's all we're
17 asking for in this case.

18 Now, the Court has already held that it
19 will decide the amount of money in this case at the end
20 of the trial; so we're not going to be asking you for a
21 specific dollar amount. But you, as Federal jurors, are
22 gatekeeper on whether or not the Plaintiffs are entitled
23 to the money that they've already earned and that's what
24 we'll be -- that's all we will be asking you for at the
25 end of this case.

1 Now, the Defendants claim that they don't
2 owe my clients anything. They claim that my clients
3 were executives, exempt from the protections of the
4 Overtime Act, and that they were Executive Managers.
5 Now, don't be fooled. The Plaintiffs were managers at
6 the Defendants' convenience. They were managers at the
7 Defendants' convenience, and managers largely in name
8 only. Now, the Plaintiffs have the burden to prove
9 certain facts as the Judge discussed with you earlier
10 today and among those facts is that the Defendants are
11 engaged in commerce and that they employed two or more
12 people and that they earned more than \$500,000 in gross
13 receipts over the time period that we're asking for the
14 Court or for the jury to award minimum wages and
15 overtime pay.

16 Now, the Defendants have the burden to
17 prove to you that the Plaintiffs were executives, exempt
18 from the protections of the Fair Labor Standards Act and
19 not entitled to overtime and not even entitled to a
20 minimum wage. That's the Defendants' burden. Now,
21 despite the fact that that's the Defendants' burden, the
22 Plaintiffs' testimony, the Plaintiffs' evidence will
23 prove that, in fact, the Plaintiffs were managers
24 largely in name only and that they were managers at the
25 Defendants' convenience.

1 Now, before I talk to you a little bit
2 about the tasks that I believe you'll hear testimony on
3 here over the next few days, I want to put into context
4 where my clients fall in the Defendants' operation. And
5 I've never received an organizational chart from the
6 Defendants in this case; so over the weekend, I kind of
7 had this one drawn up for me and so if I could just run
8 through this very quickly. You'll hear testimony on
9 this. What I say is not evidence, but you'll hear
10 testimony on this. I've done an organizational chart
11 here so you can see where the Executive Managers, the
12 Plaintiffs in the case, fall into their organization.

13 At the apex of the company, we have the
14 two individual Defendants, Mr. Mitesh Patel and Jaymini
15 Amin. Reporting directly to the owners is the District
16 Manager, who is responsible -- there's a single District
17 Manager responsible for all three of the Defendants'
18 stores. And at the store level, each store has a
19 General Manager and the General Manager is ultimately
20 responsible for the store. And reporting to the General
21 Manager is the Executive Manager and there are two,
22 three, four Executive Managers per store and the
23 Executive Manager reports directly to the General
24 Manager.

25 Now, everyone from the Executive Manager

1 all the way up to the District Manager, they are
2 salaried employees. None of these folks is entitled to
3 overtime. The Plaintiffs here, of course, are again the
4 Executive Managers. They are the lowest level salaried
5 employee and they were entitled to overtime and did not
6 receive it. But reporting to the Executive Manager is
7 an Assistant Manager position. That is an hourly
8 position, and you'll hear testimony that these folks did
9 largely what the Executive Manager did.

10 Reporting to the Assistant Manager is a
11 Front-end Manager or a Receiver. They're sort of on a
12 level -- they're sort of the same reporting level.
13 You'll hear the Receiver referred to sometimes as a
14 Receiving Manager. Again, Front-end Manager and
15 Receiver also hourly employees. You'll also hear
16 testimony that one of the Plaintiffs, Vernon Henneman,
17 operated as a Receiver, an hourly Receiver.

18 The lowest level employee in the
19 Defendants' system is the Associate. This is also an
20 hourly position. So Associate up to Assistant Manager,
21 hourly. Executive Manager through District Manager,
22 salaried. Now, you have an idea of where my Plaintiffs,
23 where my clients fit into the Defendants' operations.
24 Now, again, despite of the fact that the Defendants have
25 the burden of proof to prove to you that the Plaintiffs

1 were executives -- that's what they're going to try to
2 convince you -- the Plaintiffs' testimony, the
3 Plaintiffs' evidence will prove that, in fact, they were
4 not executives. They were managers largely in name
5 only, and managers at the Defendants' convenience.

6 You'll hear evidence that the Plaintiffs
7 spent 80, 85, 90, 95 percent of their time doing
8 non-management work, non-management work. And you'll
9 hear about those non-management tasks that all the
10 Plaintiffs did, that all the Plaintiffs performed; and
11 I'll let them tell you what they did. The one that
12 struck me most in preparing for this case, preparing for
13 this case for trial, is the tremendous amount of
14 janitorial work that the Plaintiffs had to do.

15 You'll hear the Plaintiffs, who the
16 Defendants call executives, had to clean baseboards, had
17 to sweep, had to dust, had to change lightbulbs, had to
18 wash windows, had to clean bathrooms, had to clean
19 toilets, had to fix toilets. And you'll hear that the
20 Plaintiffs spent more of their time doing those
21 janitorial work, janitorial duties, than they spent
22 doing the duties that the Defendants say make them
23 executives, Defendants say make them managers. You'll
24 hear that from the Plaintiffs. And what you will hear
25 is that the Plaintiffs actually spent -- actually spent

1 80 to 95 percent of their time performing practically
2 the same jobs that the Associate performed.

3 Now, you will also hear -- well, before I
4 go there, let me talk to you a little bit about a couple
5 of witnesses who are going to come in and talk about
6 this, that the Plaintiffs spent so much time doing the
7 Associate work. You're going to hear from Sam Wernli
8 and Michelle Williams. Both of these individuals are
9 former Associates for the Defendants, and they're going
10 to testify that the Plaintiffs spent a tremendous amount
11 of time working alongside them doing the exact same work
12 that they were doing as Associates for the Defendants'
13 operation.

14 Now, you're also going to hear why the
15 Plaintiffs spent so much time, so much of their time
16 doing non-management work; and the reason is the
17 Defendants rarely, extraordinarily rarely -- you're
18 going to hear that. That's the Defendants' words. The
19 Defendants are going to testify or going to admit that
20 they extraordinarily rarely approved overtime for their
21 hourly Associates, for their hourly Front-end Managers.
22 Why? Because it's expensive. It's expensive to pay
23 somebody time and a half.

24 Well, what they did was they had -- they
25 called the Plaintiffs managers, now telling you they're

1 executives; and they had them pick up the slack to
2 finish the work that the hourly Associates, that the
3 hourly Front-end Managers and the hourly Assistant
4 Managers could not finish because there simply was not
5 enough time in the day and not enough time particularly
6 on their payroll, in their payroll records, to allow the
7 hourly folks to finish the work. So the Defendants had
8 a practice of using the Executive Managers to pick up
9 that slack.

10 Now, to be fair, when it was convenient
11 for the Defendants, the Plaintiffs did perform some
12 management tasks; and you will hear them talk about
13 that. You will hear them talk about the time that they
14 spent performing a few little management tasks here and
15 there, again, when it was convenient for the Defendants;
16 but they spent very little of their time doing it -- 10
17 to 15, maybe 20 percent of their time. And again, the
18 hourly employees performed almost every single task that
19 the Defendants now claim made the Plaintiffs exempt
20 executives under the law.

21 In addition to that, they didn't
22 perform -- the Plaintiffs did not perform any of the
23 duties that you would expect of a manager, of an
24 executive in the Defendants' operations. They did not
25 have significant budgetary duties/responsibilities.

1 They did not have profit-and-loss responsibilities.
2 They had no say in how the company advertised. They had
3 no say in the company marketing plans. They did not do
4 many of the things, once again, that you would expect of
5 an executive whom the Defendants did not pay -- to whom
6 the Defendants did not pay overtime while they were
7 working as salaried managers for the Defendants.

8 You'll also hear about the conditions
9 under which the Plaintiffs performed these duties and
10 while they were doing non-management tasks and spending
11 a little bit of time doing management work, their days
12 were significantly severely routinized and regimented.
13 They were told what to do throughout the day. You'll
14 hear evidence about the fact that the Plaintiffs had to
15 follow planners that came down from the Party City
16 corporate, the big Party City corporate office that
17 dictates to the Defendants' three franchise stores how
18 to market, how to merchandise their -- the items that
19 they're selling, the party supplies.

20 You'll hear about how they had to follow
21 these corporate planners. You'll hear about how they
22 had to follow checklists, how they had to follow to-do
23 lists. Practically every minute of every day was
24 predetermined for what the Plaintiffs were going to do.
25 So not only did they do -- spend much of their time

1 performing non-management tasks, they did so in a way in
2 which they exercised little to no discretion over how
3 they performed those duties. And you'll also hear
4 evidence about how the Plaintiffs were micromanaged from
5 mainly the District Manager and Ms. Amin, the owner of
6 the company. They were constantly told how to do it,
7 how to do their jobs. The micromanagement was intended
8 to supplement these already incredibly detailed
9 checklists, planners, and to-do lists.

10 Now, you'll notice there's just one
11 District Manager and, of course, there's only one Jaymi
12 Amin and you've got to wonder to yourself how did they
13 know what was going on in all three stores such that
14 they could dictate what the Plaintiffs were doing, tell
15 them how to do it. They knew because the Defendants had
16 installed an extensive surveillance camera system in all
17 three of their stores. And you'll hear testimony to the
18 effect that the surveillance camera systems really
19 weren't used so much for theft prevention. They were
20 used for personnel matters. They were used to watch
21 their employees, e-mail and make telephone calls to tell
22 them what they were doing wrong. Almost always to tell
23 them what they were doing wrong. I don't recall a
24 specific example of what they were doing right. Now,
25 you'll hear from the Plaintiffs that they received

1 sometimes up to 30 e-mails and telephone calls a day.

2 So this is the evidence you'll hear.

3 They performed mostly non-management tasks according to
4 strict directives from the Defendants and under an
5 always watchful micromanagerial eye. Now, I want to talk
6 to you about a few of the witnesses you're going to hear
7 from today. I've already told you about Sam Wernli and
8 Michelle Williams, both third-party witnesses who have
9 no financial stake in this case. You will also hear
10 from several witnesses about the Defendants' general
11 attitudes toward paying overtime. You're going to hear
12 testimony that indicates that they just didn't like
13 paying it, and that's fine. That's fine. It's
14 expensive to pay overtime. But if you work somebody
15 more than 40 hours a week and they're entitled to
16 overtime, you should pay it. And that's why we're here.

17 But you're going to hear about their
18 attitudes in general about paying overtime and one of
19 the people you're going to hear from is Jody Herrera,
20 who is a third-party witness. She, again, has no
21 financial stake in this case. She's not a Plaintiff.
22 She was the Defendants' bookkeeper for five years. She
23 was the Defendants' bookkeeper until she resigned in May
24 of 2010. And we expect her to testify that on a number
25 of occasions, Mr. Patel -- one of the Defendants in this

1 case, and one of the owners of the company -- instructed
2 her to shave time off. Short people who had worked
3 overtime. Don't pay them 30 minutes. If they work over
4 40 hours in a week and they only worked 30 minutes, but
5 not 41 hours -- if they worked 30 minutes over 40 in a
6 week, don't pay them that overtime. You pay them that
7 straight time. Now, that adds up. That's one person in
8 one week. Think about it over the course of a year,
9 five years.

10 She will also testify that Mr. Patel
11 instructed her to dock people's pay 30 minutes if they
12 worked a full five hours or a full six and a half hours
13 in a day and the rational was that, well, they couldn't
14 possibly work five hours or six and a half hours without
15 taking a break; so we're just going to assume they took
16 a break and shave 30 minutes of their time. That's what
17 Mr. Patel told Ms. Herrera to do. That's what we expect
18 her to testify to.

19 THE COURT: Five minutes.

20 MR. MORELAND: Thank you, Your Honor.

21 Ms. Herrera refused to do this and when
22 she did, Mr. Patel became very angry. So you'll hear
23 from Jody Herrera. Now, I want to flag for you a couple
24 of -- a few things that we expect the Defendants to do.
25 One, again, they bear the burden of proof to prove that

1 the Plaintiffs were exempt executives. Executives
2 exempt from overtime pay. And I expect the Judge to
3 instruct you when this case is over, that you should
4 consider the Plaintiffs' job duties as a whole. Not
5 just a few little pieces. But the Defendants are going
6 to try to excise for you, try to cut out, little bits
7 and pieces of what the Plaintiffs were doing and mush
8 them together, mash them together, and call it the whole
9 picture.

10 Well, don't be fooled. And when they're
11 doing that, ask yourself: Where do janitorial duties
12 fit into the Defendants' picture of what the Plaintiffs
13 were doing on a day-to-day basis? Where were the other
14 non-management duties? Where do those fit in?

15 Now, I also expect again the Defendants
16 to talk about the Department of Labor investigation that
17 we talked about during the voir dire. Now, bear in mind
18 that that was for a previous company and for a position
19 called Assistant Manager, which in this organizational
20 chart is an hourly position. It wasn't called Executive
21 Manager, and it happened ten years ago. Be cognizant of
22 these facts when you're listening to the testimony,
23 listening to the evidence.

24 Now, I want you to listen for yourselves
25 to the evidence and judge for yourselves the

1 creditability of the witnesses in this case. And when
2 you do, I think you'll agree with me that the Plaintiffs
3 were managers at the Defendants' convenience and I think
4 you'll agree with me that they are entitled to the fair
5 pay that they have earned working long hours for the
6 Defendants.

7 And by the time we say good-bye and we've
8 finished our work -- all of us, because you have a tough
9 job -- I think that we'll be able to look back on this
10 week, this four or five days, and say that this was a
11 good week for the American justice system. And my
12 Plaintiffs, my clients, are asking you to use your
13 considerable power as a Federal jury and return to them
14 the fair pay that they've earned. Thank you.

15 THE COURT: Mr. Welch.

16 MR. WELCH: Do you mind if I use your
17 chart?

18 MR. MORELAND: Absolutely not.

19 MR. WELCH: Thank you.

20 All right, to understand what the
21 Executive Manager position is, to understand how
22 important it is -- if we could turn this off Mr...

23 MR. MORELAND: Yes, sorry.

24 MR. WELCH: To understand exactly what it
25 is, you have to know a little bit of the history of

1 Party City. You heard me cover this in voir dire. But
2 because this is opening and voir dire is not on the
3 record as far as this case goes, I'm going to cover some
4 of that history again. The company's name now is Party
5 City. It's not always been Party City. It used to be
6 Party Pig. In voir dire, a lot of you said, yeah, we --
7 you kind of nodded your head, I remember where Party Pig
8 was. It was up here on 2900 West Anderson Lane, and
9 here's how it started.

10 Mr. Patel was a General Manager at and
11 Eckerd's, which is now, what, CVS. And he and his dad
12 learned that an operation, a little small business, a
13 little 3,400 square foot business on West Anderson Lane
14 had come up for sale. It was run by Mr. -- a gentleman
15 named Mr. Kurtz, I believe. Mr. Kurtz was selling his
16 business, and Mr. Patel and his dad bought it. You're
17 going to see some pictures of that original operation.
18 It's nothing like what they're running today. You're
19 going to see a little 3,400 square foot store, low
20 ceilings, cramped inventory bins. Certainly not the
21 breadth of inventory that they have today. They ran
22 that single store for 14 years.

23 In 1998, they opened two additional
24 locations. They opened one on Brodie Lane, which is
25 where they're located now. That's one of their current

1 locations. They have three now. They had a second one
2 in the Hancock Shopping Center at 51st Street and I-35.
3 That one is no longer there, but let me bring you
4 somewhat current. I'm going to bring you to 2007. 2007
5 is going to be significant in this case. I'm going to
6 use that date over and over.

7 But in 2007, they had all the three
8 current locations that they have right now -- Brodie
9 Lane down south of 290 in Sunset Valley, Parmer Lane,
10 and then their large one up on Balconies. Now, remember
11 their first store was a 3,400 square foot store.
12 They've grown to say the least. Their largest store is
13 25,000 square feet. That's the one up on Balconies.
14 That's about the size of your average Best Buy. And
15 you'll hear at any given time, there's typically about
16 two Executive Managers that are running or in that
17 store, the same size as a Best Buy; and for the most
18 part, they're responsible for running that store. The
19 other two stores are a little bit smaller. The Brodie
20 store is 10,000 square feet, and the Parmer store is
21 12,000 square feet. So you've got the three stores.

22 So what happened in 2007? Well, they're
23 Party City now. They joined this national franchise and
24 interestingly enough, you would probably recognize the
25 two different logos from Party Pig to Party City. You

1 remember they've got the kind of the whompy-jawed
2 letters of varying colors that now say Party City --
3 they used to say Party Pig -- and they looked almost
4 identical. But they became part of this national
5 franchise, and that franchise is now what's considered
6 to be the largest retailer of party supplies in America.

7 We talked in voir dire about what they
8 sell. They sell party supplies for just about any
9 occasion. Halloween supplies, luau supplies, New Year's
10 Eve supplies to graduation supplies, bar mitzvah
11 supplies, christening supplies. Again, anything you
12 could possibly want to use to decorate and festoon your
13 activity, they sell. Their biggest season of the year
14 by far -- and it will come up in this trial -- is
15 Halloween.

16 You remember all these horrendous hours
17 that Mr. Moreland talked about that they worked, those
18 hours were done primarily during Halloween. There's
19 about a month in the year there -- you'll see video of
20 the store from one of these surveillance cameras. And
21 by the way, you'll hear Mr. Patel talk about how this is
22 a normal surveillance system and how he knows that from
23 working in Eckerd's and various retail stores around the
24 country. You'll see video of how packed the place gets
25 at Halloween.

1 These folks are Executive Managers.
2 They're there to make sure the store runs properly.
3 They work some long hours during that month. You'll see
4 all their time records. They work between 45 to 55
5 hours, more or less, a week. Mr. Moreland had a graph
6 up there and they averaged, what, 50 to 55, sometimes 60
7 hours. So, you know, sometimes they would work 70, 80
8 hours. There might have been a time or two where they
9 worked 90 or 100 hours, but they're rare. It's
10 seasonal, and typically at Halloween.

11 So we've got Halloween supplies. I've
12 already talked about the different supplies that they
13 do. Again, the Patels -- the Patels still own it,
14 Mitesh Patel, Jaymi Amin. Their father is still a part
15 owner, also. The issue that you're going to decide is
16 whether or not these Executive Managers qualify for the
17 managerial exemption. The executive exemption. You'll
18 hear it called both during this trial. The -- and here,
19 I'm going use Mr. Moreland's chart, you do have what I
20 call the dilemma of the middle manager.

21 You remember during voir dire there was
22 some discussion about some complex Federal regulations
23 and it gets a little difficult to figure out sometimes
24 when somebody is an executive employee. When they have
25 enough managerial duties to qualify to be exempt.

1 You've got different levels of folks here. By the way,
2 the Front-end Manager and the Receiving Manager are two
3 different positions; but they're both -- they both have
4 managerial duties. The Assistant Manager has managerial
5 duties, too. Mitesh and Jaymi Patel, Jaymi Amin and
6 Mitesh Patel have managerial duties, too; but nobody is
7 going to dispute that they're managerial and that
8 they're exempt.

9 So at what point do you accumulate enough
10 managerial duties to be considered exempt, and that's a
11 difficult question. That's why we're here today.
12 That's why the parties have spent hundreds of thousands
13 of dollars in fees to get to this point because we have
14 a stack of Federal regulations -- here is a slender,
15 sliver of what they are in microprint; this is only
16 about 50 pages out of a few hundred -- that tell you
17 what an Executive Manager is. How is an employer
18 supposed to read this and figure out whether they're
19 going to get sued because maybe they classified a
20 manager incorrectly. That's what we're here to figure
21 out.

22 Now, here's what the regs tell you and I
23 believe the Judge is going to instruct you on this at
24 the end of the trial. You're going to get what's called
25 a jury charge and it's going to have instructions. It's

1 going to have questions. You're going to answer some
2 questions. It will have instructions on how to answer
3 those questions. The regulations don't really define
4 what a manager is. They don't really define what a
5 managerial duty is.

6 What they do is give you a bunch of
7 examples. Let me read you some of those examples.
8 Interviewing; hiring; firing; selecting and training
9 employees; scheduling their work; drafting weekly
10 schedules; adjusting hours of work; supervising the work
11 of employees; maintaining production or sales records
12 for use in supervision or control of employees;
13 evaluating employees for promotions, demotions, pay
14 raises; handling employee complaints and grievances;
15 disciplining employees. Here it will be called
16 counseling. They have counseling forms. You'll see a
17 bunch of that. You'll see these Executive Managers
18 counseling people in writing. Planning employees work,
19 planning how the work is to be done, apportioning work
20 among employees, monitoring safety, providing for the
21 safety and security of employees or the store's
22 property, bringing in employees to replace employees
23 already on schedule who call in sick, providing verbal
24 feedback to employees regarding their performance,
25 handling customer complaints, closing the store.

1 You'll hear a lot about this. Their
2 activities like counting down the cash. It's a cash
3 register reconciliation process. Remember, this is --
4 one of these stores is 25,000 square feet. They have a
5 lot of cash registers, and it's a significant operation
6 at the end of the day. Preparing bank deposits, filling
7 out reports of sales performance and events throughout
8 the day, putting the money in the safe at night. Each
9 one of those duties the Federal regulations or case law
10 give as examples of what is a managerial duty.

11 We've already deposed the Plaintiffs in
12 this case or five of them. The five named Plaintiffs.
13 There are 16 Plaintiffs. But the five named Plaintiffs
14 who came together and filed this lawsuit, I've deposed
15 them in a deposition with a court reporter. They
16 admitted they did every one of these things. I asked
17 them: Did you consider that to be a managerial duty?
18 They said yes to every single one.

19 Now, let's think about it. What is the
20 quintessential managerial duty? Hiring, interviewing,
21 and firing. It doesn't get much more managerial than
22 that because when you hire somebody, what do you have to
23 know? You have to know what happens in store
24 operations. You have to know what a cashier does. You
25 have to know what the Receiving Manager does when these

1 big trucks full of inventory come in. You have to know
2 how to distribute the inventory throughout the store.
3 You have to know everything about the entire store if
4 you're hiring people.

5 Firing is the same thing. Never mind the
6 effect it has on the person that you have to fire
7 unfortunately; but you have to make a determination when
8 you're firing someone, that they're no longer valuable
9 to the success of that store. They don't -- for
10 whatever reason, they can't -- and we've all been fired.
11 I've been fired. You are no longer viable to the
12 success of that store's operation. The same thing when
13 you're hiring them. You have to know what's going to
14 make that store successful. Again, how does it get more
15 managerial than that?

16 This position here, the Executive Manager
17 position, never mind that whole list of things I just
18 went through that they do. It has particular importance
19 to this operation, and this has to do with the
20 franchise. The franchise that they joined in 2007.
21 You'll hear Mr. Patel testify about why they joined the
22 franchise. And here's how he describes it. Apparently,
23 they have this concept. It's called one brand, one
24 vision. And all that means is throughout the country --
25 I call it the Olive Garden rule. Okay? You can go to

1 any Olive Garden in the country, whether it be Boston,
2 Massachusetts, or Austin, Texas, and your fettuccine
3 alfredo is going to taste exactly the same. The
4 interior of that store or that restaurant will be
5 exactly the same. The menus will be exactly the same.
6 And what that does is it gives you a national customer
7 base.

8 That's the benefit to M. Patel Enterprise
9 of being part of this national franchise. It's
10 extraordinarily important to them. Well, that requires
11 a stunning amount of standardization. If you come into
12 a Party City in Austin, Texas, you can be sure that it
13 will look almost identical, if not identical to one in
14 Boise, Idaho -- I don't know if we have a store in
15 Boise, my guess is we do. You'll find the same
16 merchandise, the same costumes, the same look and feel,
17 the same signage. It will be festooned for the same
18 season. You'll hear a lot about that. We change
19 seasons frequently. I think there's -- we just went
20 from the luau, which is some summer theme, to Halloween,
21 which is another theme. And this requires -- and we're
22 about to transform into another theme. I'm not sure
23 exactly what that is. I'm sure we'll hear.

24 But the point is, any store that you go
25 to throughout the country, it will be themed the same.

1 It will have the same signage. It will have the same
2 everything. And, again, that creates a national
3 customer base. You're no longer mom-and-pop Party Pig
4 where you're having to come up with this stuff on your
5 own. You have a national customer base. And there are
6 other benefits. For example, you get national
7 advertising -- television, print, radio. You get
8 product support. You'll hear a lot about planograms.

9 A planogram is basically a plan that came
10 from corporate that tells you here's how the inventory
11 needs to be displayed. You'll hear about, for example,
12 there's a Hello Kitty planogram and you may be familiar
13 with what that product is. It will tell you how to
14 display that merchandise. It will have signage that you
15 put out. You get all of that. This national
16 merchandise signing is coordinated for you at corporate.
17 That's a huge benefit. You decorate your store. It
18 helps move product. The buying power, you've got the
19 buying power of a national chain. You don't pay as much
20 for your inventory. You get buying powers in regards to
21 shipping. Your shipping is cheaper because you've got a
22 huge negotiating arm here that can control or help lower
23 your shipping charges.

24 And here's how it ties into the Executive
25 Managers. Remember, I said the evolution, the history

1 of this store tells you how important the Executive
2 Managers are to this operation. The Executive Managers
3 are the frontline, salaried managers who are responsible
4 for implementing these corporate directives. And there
5 are consequences for not implementing those corporate
6 directives. You're going to hear about these things
7 called -- you're going to hear about these things called
8 weekly planners.

9 This is a weekly planner. You see a
10 calendar on the front. These are fairly thick. There's
11 a lot of information in here. You've got price changes.
12 It tells you when the seasonal changes are. Remember,
13 luau theme to Halloween theme. It tells the stores
14 here's the signage that needs to be put up. Corporate
15 would ship out the signage to them. You would have to
16 change out inventory. Suddenly we go from no Halloween
17 stuff or less Halloween stuff, and we're going to
18 transition into some other season. The corporate
19 directives contain all that. National pricing, pricing
20 changes. It has coupon campaigns. We're running a
21 coupon on party hats are now cheaper this month, and
22 it's a national campaign. Remember, you've got national
23 advertising. You've got national coupons.

24 These weekly planners contain all those
25 corporate directives. The Executive Managers are the

1 frontline managers who are responsible for making sure
2 all that gets implemented and these directives, as
3 you'll hear from Mr. Patel, are enforced by corporate.
4 They send in secret shoppers, secret inspectors. And
5 what happens is if you're not complying with this, you
6 lose -- you could lose your franchise. And you'll hear
7 that's exactly what happened in 2007.

8 In 2007, some inspectors from corporate
9 came into one or more of the three Party Cities and we
10 got a termination letter that said something along the
11 lines of if you don't get this fixed, you're going to
12 lose your franchise. And Mr. Patel will readily admit
13 we were still running Party City as if it were still
14 Party Pig, where we made all the decisions. We weren't
15 implementing -- our Executive Managers weren't
16 implementing what they needed to from corporate and we
17 almost lost our franchise. And when they lose their
18 franchise, they don't only lose -- they don't get to
19 revert back to Party Pig. They can't. There's a
20 noncompete that says you have to shut down. You can't
21 even operate a Party Pig because the franchisor is going
22 to come in and open up some more Party Cities. You're
23 out of business. This is their occupation.

24 And I say this because now we've got it
25 running right. The Executive Managers are implementing

1 the policies they need to, but it shows you how
2 important this Executive Manager position is to Party
3 City's operations and how much we rely on them. They
4 will agree, because unless they change what they
5 testified to, that their managerial duties -- that long
6 list I went over with you, everything I've talked
7 about -- they agree that their primary responsibility,
8 their primary job, the reason they were there -- you'll
9 hear them describe it in different ways, but it sounds a
10 lot alike -- their primary reason for being there was
11 their managerial duties.

12 The Court will instruct you that you can
13 spend less than 50 percent of your time on managerial
14 duties. Remember, I talked a little bit about that in
15 voir dire or I asked somebody: Do you think that if
16 someone spends less than 50 percent of their time on
17 managerial duties, that they can still be considered
18 managerial?

19 And she answered -- happens to be correct
20 with what I think the Judge will instruct you -- that,
21 yes, if you spend less than 50 percent of your
22 managerial duties, you can still be considered exempt.
23 And that's what happened here. I don't think anyone
24 is -- Mr. Patel thinks it's about 40 percent of their
25 time. But the primary reason they were there was to

1 manage this company. They hired and fired. They did
2 all the quintessential things that I think and I hope
3 you think most people associate, including the Federal
4 government who issued a bunch of regulations listing
5 examples of what constitutes a managerial duty, that
6 their primary job was managing the company.

7 All right, it's already started. I call
8 it dumbing down the duties. Mr. Moreland certainly gave
9 you a taste of what you're going to hear. They're going
10 to try and --

11 THE COURT: Two minutes.

12 MR. WELCH: Thank you.

13 They're going to try and dumb down the
14 Plaintiffs or what they did. They're going to say,
15 well, we cleaned the bathrooms at times. They may say
16 they cleaned the bathrooms a lot; but they're going to
17 dumb down the extent of their responsibilities, what
18 they were responsible for on a day-to-day basis. And
19 why? Because they want to win. They want to get some
20 money. That's why they're here. They may honestly
21 think they're entitled to it, but the goal is to make
22 you think that their managerial duties weren't what they
23 were there for.

24 And as you may expect, we're going to
25 talk about how important the duties were. I already

1 have. You've seen the two opposing sides. Is there an
2 objective source of information on the issue? Yes,
3 there is. Their resumes. You'll see a bunch of their
4 resumes that they circulated to gain employment after
5 they left. This is what they told potential, future
6 employers as to what they did. And there's no fudging.
7 I think that was a term used when we were asking
8 about -- Mr. Moreland was asking about the importance of
9 resumes. They identified the vast majority of what the
10 Government says are managerial duties as what they did.
11 Hiring, firing, supervising 50 employees. All the
12 things that would be considered managerial. Okay? So
13 were they stretching the truth then, or are they
14 stretching the truth now? That's the quintessential
15 question.

16 The second objective source, Patti
17 Tomasek. She was our District Manager during the time
18 most of these folks were there. Intimately involved
19 with their day-to-day activities, what the Executive
20 Managers were responsible for. She no longer works for
21 us. She left for personal reasons. Her mother was
22 sick. She hasn't worked for us for over a year. She
23 has no financial ties to us. She's not going to try and
24 work for us again. She'll tell you that she is
25 absolutely unbiased and doesn't care who wins one way or

1 the other. I've deposed her, too. And she will tell
2 you that she thinks that their positions were managerial
3 and that that was the real reason they were there, to
4 exercise those managerial duties.

5 THE COURT: It's time.

6 MR. WELCH: Can I have 30 seconds, Judge?

7 THE COURT: Just wrap it up.

8 MR. WELCH: Thank you.

9 The Plaintiffs go first. They're going
10 to call Mr. and Mrs. Patel. They're probably going to
11 call some of my witnesses. And you will hear me -- I'll
12 probably do a little cross-examination on my own client,
13 but you'll hear me say frequently I'm going to reserve
14 for our case in chief to present some of the testimony I
15 want to elicit from them. So just because I don't go
16 into some of the items that Mr. Moreland goes in with
17 the Patels, please wait for our case in chief. They'll
18 rest their case. Then I'll start my case. It may be a
19 few days from now, but I get to present my evidence in
20 an orderly, coherent manner, too.

21 So I ask that wait, please, and listen to
22 what my clients have to say in our case in chief. Thank
23 you very much.

24 (End of Opening Statements)

25

1 REPORTER'S CERTIFICATION

2
3 I HEREBY CERTIFY that the foregoing is a true and
4 correct transcript from the stenographic notes of the
5 proceedings in the above-entitled matter to the best
6 of my ability.
7
8
9
10

11 _____/S/_____ July 10, 2012____

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